(25)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 427-428

INLAND STEEL COMPANY, A CORPORATION,
Petitioner,

vs.

FOREMAN M. LEBOLD AND SAMUEL N. LEBOLD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Inland Steel Company by Carl Meyer, Paul M. Godehn, and J. F. Dammann, its attorneys, respectfully shows:

STATEMENT OF MATTER INVOLVED.

This is an action in equity by the Lebolds against Inland Steel Company for an accounting for damages claimed to have resulted from an asserted wrongful dissolution of the Steamship Company, a West Virginia corporation, of which they were minority stockholders. The Steamship Company was an 80% owned subsidiary of the Steel Company, and its business since its formation in 1911 by the Steel Company and the plaintiffs' father, Nathan Leopold, from whom they inherited their stock, consisted of carriage on the Great Lakes of the Steel Company's ore, coal and stone to its plant at the south end of Lake Michigan.

The dissolution was effected under a statute of West Virginia providing for voluntary dissolutions by stockholders on a vote of 60% or more of the stock.

The first meeting called to consider a resolution to dissolve was stopped by the plaintiffs securing a District Court order enjoining the proposed dissolution and sale of the Steamship Company's assets. (O. R. 144, 149.)*

On hearing the District Court dissolved this injunction. The Circuit Court of Appeals affirmed. (*Lebold* v. *Inland Steamship Company,* 7th Circuit, 82 Fed. (2d) 351; Also, Appendix to this Petition, Page I.)

The meeting was then held and the dissolution and sale were voted for by the Steel Company's 80% majority stock. (O. R. 42, 43.) The physical assets of the Steamship Company, consisting chiefly of three ore boats, were then bid in at the sale by the Steel Company for a price

* The letter "R" is used to indicate references to pages 1 to 235 of the Record. The letters "O. R." are used to refer to the printed record on a prior appeal of this case. This prior record starts at page 237 and consists of the pages thereafter numbered from 1 to 240.

that has always been admitted to be fair and adequate for those properties. (O. R. 42; R. 57.) However, after the net proceeds of the sale had been ratably distributed to the stockholders and the corporation dissolved, the plaintiffs, claiming an additional value represented by the past earnings of the Company made from the carriage of the Steel Company's traffic at capacity operation and going rates, filed this bill for an accounting and charged that the Steel Company had used the legal instrumentality of dissolution to freeze out the minority interest and to appropriate without paying for it the Steamship Company's business of carrying the Steel Company's traffic.

At the trial the plaintiffs stipulated that there was in effect no contractual arrangement of any kind requiring a continuance of the traffic condition which was responsible for the Company's earnings. (O. R. 194.) They further stipulated that without the traffic of the Steel Company the Steamship Company's operations on the Great Lakes would have resulted in substantial yearly losses. (O. R. 196.) The District Court held there had been no fraud by the defendants, that the plaintiffs had been given full value, and denied any recovery. (O. R. 230.) The Circuit Court of Appeals held, 125 Fed. (2d) 369, (also Appendix to this Petition, Page XXIV) with the plaintiffs and reversed and remanded the case to determine damages. Certiorari was denied by this court April 27, 1942, 316 U. S. 75.

Upon the hearing on damages, the District Court valued the stock of the Steamship Company as representing all of its assets and included in those assets for valuation the asserted property right of the Steamship Company as a going concern to carry the Steel Company's traffic and accordingly capitalized its past earnings.

The judgment as entered was based on the value of $2,350 per share, less liquidating dividends, together with interest, or the sum total of $684,341.32.

On appeal by the Steel Company, the Circuit Court of Appeals refused to change its former ruling as to liability, but found that the evidence did not justify a value of the stock in excess of $1,350 per share and entered judgments in the two cases (there being two appeals) in the amount of $299,317.42. (R. 225, 226.) This judgment also represented a valuation solely of the alleged property right of the Steamship Company to carry the Steel Company's traffic at capacity operation and at going rates for an indefinite time in the future, *Lebold* v. *Inland Steel Company,* 136 Fed. (2d) 876. (Also, Appendix, Page XX.)

This petition seeks to review the basic error in the judgment which charges the Steel Company with receiving through the public sale of the Steamship Company's assets, property which was not the Steamship Company's to sell and which the Steel Company did not acquire by virtue of that sale, but which was and always had been its own property—the right to transport its own traffic in its own boats or in any other way. That basic error of forcing the Steel Company to buy and pay for its own property is the error sought to be reviewed and corrected through this petition. The figures with reference to it merely show that the error was important and resulted in a substantial penalization of this petitioner.

There is no substantial dispute of fact in the record here which consists of the evidence, including a stipulation of facts, before the District Court and the Circuit Court of Appeals in the injunction case referred to above, as well as the evidence presented at the other two hearings.

(1) The Business the Steamship Company Was Engaged In.

For many years it has been the practice of the steel business on the Great Lakes to have ore, limestone, and some coal transported in boats of one or the other of two classes

—those belonging to the steel companies themselves or their wholly owned subsidiaries, or those belonging to independent contract carriers who obtain in the open market such tonnage as can not be moved by the steel companies' boats because of lack of capacity. (O. R. 46; R. 79, 80.) The capacity of all the boats on the Great Lakes is much greater than available traffic. The result is that the boats owned by the steel companies, called captive ships, travel at capacity operation during the season, while the competitive carriers secure only a small proportion of the traffic. (O. R. 80, 81.)

The freight rates for this carriage are not fixed by any Federal or State rate making body, but they are the result of competition, and over the years have remained more or less unchanged. (O. A. 46, 192.) They are sufficient in fact, to produce for some competitive ship owners a fair return on their capital investment. (R. 88-96; 122-126.)

(2) Inland Steamship Company.

Prior to 1911 when the Steel Company was small and controlled by a few families (R. 128), it had all of its traffic carried in the boats of competitive carriers. In that year the plaintiffs' father Nathan F. Leopold suggested to his brother-in-law, P. D. Block, who was one of the founders of the Steel Company and its then Vice President and later President, that a subsidiary corporation be organized to acquire cargo vessels and transport its own traffic on the Great Lakes. This subsidiary was not, however, to be wholly owned by the Steel Company. (O. R. 56.)

Pursuant to this suggestion the Steamship Company was organized under the laws of West Virginia with an authorized capital of $160,000, 1,600 shares at $100 per share. (O. R. 138-141.) The Steel Company acquired 1,080 shares or 67.5% of the total; Nathan Leopold acquired 295 shares or 18% of the total, for which he paid $29,500 (O. R. 205);

225 shares were acquired by the officers and employes of the Pioneer Steamship Company (O. R. 196, 205) which later became the operator of the ships of the Steamship Company under a management contract (O. R. 193) and also the carrier of the surplus tonnage of the Steel Company. (O. R. 46, 49.)

The Steamship Company acquired two ships and later a third (O. R. 190-191) and operations began and continued for a period of 24 years. Its activities were limited almost exclusively to the carriage of the traffic of the Steel Company at capacity operation (except during the depression year of 1932) and at the so-called going rates paid to the competitive carriers on the Great Lakes. (O. R. 196.)

The Steamship Company had no administrative expense. It was managed by the Steel Company's officers without pay. Its clerical work was performed by the Steel Company's employes without charge, in the offices of the Steel Company, without rent. Its actual operation was performed by another company, Pioneer Steamship Company, for an annual fee. (O. R. 193.)

During the period of its existence the Steamship Company paid out of earnings almost two-thirds of the cost of the first two boats and practically all of the cost of the third boat, $1,400,000 in all.

In addition, it earned $3,237,413.28 and paid dividends of $2,824,000 on its capital stock of $160,000. The plaintiffs' and their father were paid on his $29,500 investment average annual dividends of $21,694, totalling $520,675 for the period. (O. R. 101.)

During the entire period of the Steamship Company's existence, the yearly dividends of the company averaged $75 (O. R. 141) and during the last 11 years $105 per share, and during the last 3 years, $150 per share. (Bill of Complaint 4, Par. 7, Answer, O. R. 21; Stipulation, Par. 2, O. R. 191.) The plaintiffs' expert witnesses esti-

mated the earnings for the future at $200 per share on the assumption that the Steamship Company would continue to carry the Steel Company's traffic at going rates and capacity operation. (R. 21, 39, 68.) There was nothing abnormal or unusual about the ore traffic on the Great Lakes or about the ships of the Steamship Company as compared with other ore ships. (O. R. 97.) There was no shortage in the market for such boats. In fact, there was an oversupply. (R. 78.) (Sale of the Franklin Company's boats May 1936, R. 70.)

The admitted fact is that the company's abnormally high earning record was due to the carriage by the Steamship Company of the Steel Company's traffic at capacity operation and at so-called going rates.

(3) The Termination of the Traffic Relationship Between the Two Companies.

In December, 1934, the officers of the Steel Company brought up the question, how long the Steel Company in the interest of its own stockholders could continue having its traffic transported by its partially owned subsidiary at a cost which was netting to the subsidiary 150% dividends yearly. (O. R. 51, 52, 79, 165.) There being no contractual arrangement of any kind between the companies (O. R. 194) and it being a fact that the traffic had been placed by the Steel Company with the Steamship Company for so many years, largely because of the close personal relationship and kinship between P. D. Block, the President, and Nathan Leopold, his brother-in-law and the father of these plaintiffs, the conclusion was reached that the time had come when the relationship between the two companies should cease so that the Steel Company could be free to place its traffic where it could best do so. It would not do to force the Steamship Company to carry the traffic at rates lower than the going rates, as that would

still further complicate the majority-minority stockholder relationship. (O. R. 98.) The final conclusion of the Steel Company to discontinue the traffic relationship was communicated to the Steamship Company's stockholders at their meeting on December 21, 1934. (O. R. 85, 55, 74, 96, 98.) This decision, it was stated, was unalterable. (O. R. 99, Bill of Complaint 5; Answer, O. R. 23.)

(4) The Offer of the Steel Company to Buy the Minority Stock or Sell Its Own at a Price of $700 Per Share.

Having reached the conclusion to end the traffic situation the Steel Company first endeavored to buy the minority's interest. The physical properties of the Steamship Company, consisting chiefly of the three boats, were appraised at a valuation which the plaintiffs admit is fair. (R. 57.) And on the basis of that appraisal, the Steel Company offered to pay the minority stockholders $700 per share for the stock which had been bought for $100 per share. (O. R. 165-166.) The offer was accepted by the owners of 200 shares so that the majority interest of the Steel Company was increased to 1280 shares or 80%. The plaintiffs owning 295 shares and one other stockholder owning 25 shares refused the offer. (O. R. 196.) The Steel Company then offered to sell all its stock in the Steamship Company to the plaintiffs or their nominees at $700 per share, but this offer was also refused. (O. R. 97.) At that time there were available for purchase on the Great Lakes at equally favorable prices plenty of boats that would fill the Steel Company's need just as well as the Steamship Company's three boats. (O. R. 48, 52, 60, 70, 195.)

(5) Lebold v. Steamship Company.

It appearing that no agreement could be made for the purchase or the sale of the stock the first meeting was called. At the hearing to dissolve the temporary restrain-

ing order secured by the plaintiffs enjoining the dissolution and sale, the Steel Company again stated it would bid for the three ships an amount representing $700 per share of stock, but that it would be glad to let the ships go to anyone else who would bid higher, as it had no interest in the ships as such. (O. R. 96, 97, 101.)

In dissolving the injunction and dismissing the complaint for want of equity, the Judge of the District Court noted that the Steel Company was *not only free from any charge of fraud* in bringing to an end the traffic arrangement between the two companies, but that the Steel Company's stockholders might well have criticized the Steel Company for not doing so.

On appeal by the plaintiff the Circuit Court of Appeals, on March 18, 1936 (82 Fed. (2d) 351), affirmed the lower court's denial of the injunction against the dissolution and sale of assets and noted that in the event the Steel Company should carry out its proposed purchase of the assets the majority would be entitled to their pro rata share of the common property, including the going concern value of the Steamship Company.

(6) The Dissolution Sale in May 1936.

Thereupon the meeting was held and the statutory 60% of the stock having voted for the dissolution, a public sale took place and the dissolution was completed. (O. R. 111, 112.) The sale was well advertised with particular attention to some 270 concerns who are engaged or interested in transportation on the Great Lakes. (O. R. 107, 115.) There being no bids other than the Steel Company's announced bid, the three boats were sold to the Steel Company. (O. R. 42, 43.) They have been used ever since to carry the Steel Company's own traffic. After taking care of the company's liabilities, liquidating dividends amounting to $604.17 per share were paid to the stockholders and the

plaintiffs received $178,230.15, which when added to the dividends already received on their stock made a total return on the original $29,500 investment of $698,905.15 for the 24 year period. (O. R. 130.)

(7) The Bill of Complaint in Lebold v. Inland Steel Company.

The plaintiffs then brought this suit against the Steel Company, alleging that the stock of the Steamship Company was in reality worth $4,000 per share and charging that as a result they had been defrauded by the Steel Company and its president and other officers in the amount of $1,101,769.85. (O. R. 2-15.)

There was no claim ever made that there was or had been any contract obligating the Steel Company to furnish tonnage to the Steamship Company for transportation. A stipulation of facts was entered into between the parties. Its introductory paragraph was as follows:

> (1) "the facts hereinafter set forth are to be regarded as admitted, without the necessity of any proof being offered in support thereof, and
>
> (2) "the plaintiffs or defendant may introduce further evidence in amplification, but not in contradiction, of said facts." (O. R. 190.)

This agreement is followed by 32 paragraphs of facts. We reproduce paragraphs 16 and 23 with underscoring for emphasis.

> "16. At the time of the dissolution of Steamship Company, there was no contractual arrangement of any kind between Inland Steel Company and Steamship Company with reference to the carrying by Steamship Company of all or any part of the tonnage of said Inland Steel Company. This situation had existed for more than ten years before the dissolution of Steamship Company. (O. R. 194.)
>
> "23. The cessation of the carriage of Inland Steel

Company's tonnage via the steamers of Steamship Company would have resulted in substantial yearly net losses to Steamship Company, and would further have resulted in the disuse of said steamers and consequent deterioration and depreciation in their value." (O. R. 196.)

(8) The Decree and Findings of the Trial Court at the First Trial.

The District Court, sustaining the report of the Master to whom the case had been referred, found that the sale had been appropriately advertised and fairly conducted; that a fair price had been paid for the boats and physical assets; that there was no express, implied or quasi contractual relationship between the Steel Company and the Steamship Company requiring the Steel Company to transport its freight traffic via the boats of the Steamship Company; that the Steel Company had a right to give its business where it pleased for any reason and was under no obligation to continue giving it to the Steamship Company; that the Steel Company did not appropriate the business of the Steamship Company or anything belonging to the minority stockholders and had not taken an unfair advantage or practiced any fraud against the minority interest; that the value of the minority interest did not exceed the amount that had been distributed to it; that the dissolution and sale were properly conducted under the West Virginia law. The bill was dismissed for want of equity. (Master's Report and Findings, O. R. 202-212; Court 222-230.)

(9) Plaintiffs' Appeal to the Circuit Court of Appeals.

The Circuit Court of Appeals, on appeal by the plaintiffs, reversed and remanded and stated a rule of damages to be followed by the trial court as follows:

"The damages to be allowed are the difference between what plaintiffs have received from the sale of

> the physical assets and what the stock was really worth as stock in a going prosperous concern continuing in business. Upon that rule the trial court will fix plaintiffs' Damages."
>
> *Lebold* v. *Inland Steel Company*, 125 Fed. (2d) 369; also Appendix B, Page XIX.

The court also held that the Steel Company in voting the dissolution sale and buying the boats for use in carrying its own freight was guilty of fraud and would have to account to the minority for the share of the future profits which the Steel Company would make in continuing the appropriated business of carrying its own freight in its own boats. This opinion was unanimous. Lindley, District Judge, wrote it, and Evans and Sparks, Circuit Court Judges, concurred.

(10) Hearing on Damages September 1942.

On remand the trial judge had great difficulty in deciding the period of time for which he should assume that the exceedingly prosperous business of the Steamship Company in carrying the Steel Company's traffic would have continued if the corporation had not been dissolved or had been sold to someone else. (R. 55.) He finally avoided the problem by quoting in his language the Circuit Court of Appeals language, "going prosperous concern continuing in business", without making any finding on the question of duration. The plaintiffs at this hearing proceeded on the theory advanced by the Circuit Court of Appeals and produced three experts who testified to valuations of $3,000, $3,100 and $3,200 per share respectively, all *entirely based* on the past earnings of the company and the assumption that the Steel Company's traffic would *continue* with the Steamship Company for an indefinite time in the future at going rates and capacity operation. They frankly said so. (Coffman, R. 6, 26, 27, 33; Friday, 33, 38, 39, 46, 47; Hammond, 61, 69.)

The defendant proceeded on the theory that the valuation of the stock of the Steamship Company should not include any value of the asserted property right of the Steamship Company to carry the Steel Company's traffic; that the value of the company as a going concern was represented in the value of the physical assets as in effect stipulated to by the plaintiffs in the stipulation of facts; and that another simultaneous sale of a similar Steamship Company operating on the Great Lakes demonstrated that fact; and finally, even on the assumption of the Steamship Company continuing within a reasonable time as *a competitive carrier* on the Great Lakes, the stock on *estimates* of accountants and experts would not be worth more than an amount somewhere between $630 and $818 per share. (R. 123, 126.)

Some years prior to the dissolution, these plaintiffs themselves put another valuation upon this stock, as the executors of their father's estate, and for purposes of Illinois Inheritance and Federal Estate taxes. He died in 1929. There was little change in value meanwhile. They returned the stock for tax purposes at $250 per share. The Federal authorities objected and after an investigation set a value of $500 per share. (O. R. 101, 102.)

At the close of the hearing to determine the damages, the District Court, obeying the mandate of the Circuit Court of Appeals, included for valuation the asserted right of the Steamship Company to carry the Steel Company's traffic at capacity operation and going rates for an indefinite future and capitalizing its earnings, found that the stock was worth not less than $1,500 per share and not more than $3,200 per share, and gave judgment of $2,350 per share. (R. 142.)

(11) Appeal to the Circuit Court of Appeals.

The Steel Company appealed and the plaintiffs took a cross-appeal. The Circuit Court of Appeals rendered its opinion June 16, 1943. (R. 145, 154, 146, 136 Fed. (2d) 876, Appendix C to this Petition, Page XX.) The court refused to change its former ruling as to liability. Lindley, District Judge, was of the opinion that the trial court's valuation of $2,350 was amply supported by the evidence. (R. 175, Appendix, Page XXII.) But Evans and Kerner, circuit judges, were of the opinion that the evidence did not justify a value in excess of $1,350 per share. (Appendix XXIII.) The dissenting judge, Lindley, wrote the opinion for the majority (R. 172, 176) and speaking for the majority, said:

> "After mature and careful analysis of all the evidence, therefore, the court finds that it does not justify a finding of value of the shares in excess of $1,350 each, or an allowance of damages in excess of the difference between that value and the amount plaintiffs have received." (R. 175-176.)

At a conference which then took place between all counsel and the senior judge for the Circuit Court of Appeals to determine the boundaries of the retrial directed, it developed as appears from the plaintiffs' petition for rehearing (R. 205, Point 4), that a point, not mentioned in the court's opinion and never argued by either side during any part of the litigation, had been given a great deal of weight by the court in reaching a conclusion. (R. 205-206.) On July 8, 1943, both parties filed petitions for rehearing. Both petitions were denied but the court wrote a further opinion modifying its first opinion (Appendix D to this Petition, Page XXIV) and deleted the sentence in the opinion of July 16 remanding the case to the trial court and directed that the amount of the judgment be modified and as modified be affirmed. Judgments were entered on July 29, 1943, *nunc pro tunc* as of July 16, 1943, in both cases,

Nos. 8233, 8234, on the basis of $1,350 per share; that is to say, in the amount of $220,019.85 together with interest of $79,598.97, or a total of $299,618.82. (R. 225-226.)

There can be no dispute in this record that this judgment is based solely and entirely upon the alleged right of the Steamship Company to force the Steel Company to continue giving its traffic to the Steamship Company indefinitely in the future, or that if it should ever stop doing so, to account to the Steamship Company for the profits the Steel Company would expect to make in carrying its own traffic in its own boats.

STATUTES INVOLVED.

The West Virginia statute governing voluntary dissolution in effect at the time of the dissolution in this case is § 80, Article I, Ch. 31, of the Code of West Virginia on Corporations, West Virginia Code of 1937, Sec. 3092. It is set out at Record p. 135. The pertinent provisions thereof are as follows:

> "§ 80. Voluntary dissolution. * * *
> The stockholders at any time may resolve to discontinue the business of the corporation, at least sixty per cent of the shares of capital stock entitled to vote being present at the meeting and voting in favor of such discontinuance, and may divide the property and assets among those entitled thereto, after paying all the debts and liabilities of the corporation."

OPINIONS BELOW.

Lebold v. *Inland Steamship Company,* 82 Fed. (2d) 351. Decision of March 18, 1936, denying an injunction against carrying forward the dissolution and sale of assets. (Appendix A to this Petition, Page I.)

Lebold v. *Inland Steel Company,* 125 Fed. (2d) 369. Decision of December 29, 1941 (O. R. 249), on appeal by the plaintiffs, the minority stockholders, reversing and remanding to determine damages. (Appendix B to this Petition, Page X.)

Certiorari denied April 27, 1942, 316 U. S. 675.

Lebold v. *Inland Steel Company,* 136 Fed. (2d) 876. Decision of June 16, 1943. (Appendix C to this Petition, Page XX.)

Lebold v. *Inland Steel Company,* 136 Fed. (2d) 876. Decision of July 16, 1943, modifying prior opinions and decree determining damages. (Appendix D to this Petition, Page XXIV.)

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 936, 28 U. S. C. A. 347.

The original opinion was filed on June 16, 1943. (R. 172.) Petitions for rehearing were filed by both parties on July 8, 1943. (R. 179 and 195.) A second opinion, which modified the first opinion as to matters of substance and also denied rehearing, was filed on July 16, 1943. (R. 223.) Judgments were entered on July 29, 1943, *nunc pro tunc* as of July 16, 1943. (R. 225.)

The jurisdiction of this Court is invoked to review not only the judgments of July 29, 1943, but also the decision on the prior appeal rendered on December 29, 1941, and the judgment of the Court reversing the cause to the trial court for the assessment of damages. (Appendix B to this petition.) The denial of certiorari to review the judgment of December 29, 1941, is not a bar, does not change the situation (*Hamilton Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 250; *Toledo Scale Company* v. *Computing Scale Co.*, 261 U. S. 399), nor is the decision of the Circuit Court of Appeals as to the liability of the defendants, 125 Fed. (2d) 269 (Appendix B, page X), the law of the case before this court. *Messenger* v. *Anderson*, 225 U. S. 436, and cases cited.

QUESTIONS PRESENTED.

1. Whether a corporation, which is a majority stockholder of a solvent and prosperous West Virginia subsidiary corporation, commits a breach of trust by voting in its own interest and against the interest of the minority stockholders of such subsidiary to dissolve it, and then purchases for use in its own business the subsidiary's physical properties at a fairly conducted dissolution sale for a fair price which is ratably distributed?

2. Whether a corporation which furnishes lucrative business for a period of years to a West Virginia corporation in which it owns more than 60% of the capital stock, is a trustee for the minority stockholders in the sense that the parent corporation cannot exercise the statutory right to dissolve the subsidiary without paying to the minority, as damages for putting an end to a prosperous business, an amount in excess of their proportionate share of the fair value of all of the properties and assets owned by the corporation, less its liabilities?

3. Whether a court can base a decision upon a premise or assumption which is contrary to facts stipulated and agreed to by all of the parties acting by their attorneys?

REASONS FOR GRANTING THE WRIT.

The Circuit Court of Appeals in this case has decided an important question of local law in conflict with the applicable local statutes and decisions.

Ruhling v. *New York Life Insurance Co.*, 304 U. S. 202, 206.

The Applicable Local Law.

The rights of the stockholders of this West Virginia corporation are governed by the local statutes and decisions of that State.

Rogers v. *Guaranty Trust Company*, 288 U. S. 123, 129.

Germer v. *Triple State Natural Gas & Oil Co.*, 60 W. Va. 143, 54 S. E. 509.

The dissolution of the corporation as voted by the Steel Company holding 80% of the stock was effective through the West Virginia statute authorizing voluntary dissolution on a 60% vote.

West Virginia Code of 1937, Sec. 3092 • • • Chap. 31, Art. I, Par. 80; also Page 15 of this Petition.

Plaintiffs' Ex. 39, 40; R. 104, 105.

A sale of the corporate assets, a necessary step in the dissolution, as voted by the same majority was also effective through another West Virginia statute authorizing sales of corporate assets on a 60% vote.

Code of West Virginia 1937, Corporations, Sec. 3076 (64), Chap. 31, Art. I, Par. 64.

Under the law of West Virginia, a majority stockholder, acting with reference to a dissolution and sale of assets

under the statutes, may vote his stock entirely as his own personal interests dictate; he has no duty to consider the interests of other stockholders.

Thurmond v. *Paragon Colliery Co.*, 82 W. Va. 49, 53, 54; 95 S. E. 816, 817.

A criticism of the Circuit Court of Appeals decision in *Lebold* v. *Inland Steamship Company*, 125 Fed. (2d) 369, (Appendix B, Page X) contains the following in part: (University of Chicago Law Review, October 1942, Vol. 10, No. 1, Pages 7 to 84, at page 78):

> "Although the rule that the majority stockholders stand in a fiduciary relationship to the minority is often enunciated in the cases, it seldom has been applied to the action of the majority in bringing about dissolution. It is only under statutes such as that of New York, which requires that the dissolution be 'advisable,' that the courts have required majority stockholders to consider the 'corporate good' above their own personal interests in deciding whether the corporation should be dissolved. The statutes in most states, West Virginia among them, apparently give the specified percentage of the stockholders the absolute right to dissolve the corporation without regard to the interests of the minority. Similar statutes providing for the sale of the entire assets of a corporation by a majority vote have been interpreted in the same way. * * *"

And again at page 83:

> "* * * The whole question, of course, is whether the business might reasonably be expected to continue. To begin with, nowhere does the court say that Inland, once having placed traffic with the subsidiary, is bound to do so indefinitely. If it is not bound, the parent would not seem to have appropriated any good will or going concern value whatever. Furthermore, it should be apparent that the huge earnings of the steamship company could not possibly continue even if there had been no dissolution. Annual earnings of 150 per cent of the original capital investment, made

over a period of 25 years, and all made from business furnished by a single customer, suggest that the customer has been overpaying for the service it is getting. * * *"

Under the West Virginia law, a majority stockholder may purchase the dissolved corporation's assets at a fair price, and the principles of law governing trustees and other fiduciary relationships do not apply to the so-called fiduciary relationship of majority and minority stockholder to the extent that a majority stockholder purchasing properties of the corporation must account for a price which includes future profits that may be made from those properties.

Reilly v. *Oglebay*, 25 W. Va. 36, 43.

"The same rule (that a fiduciary can not himself buy trust property) does not generally apply to the stockholders of a corporation which is managed by a board of directors. Whether it does or not must depend upon the special facts of the particular case, the general rule being that a stockholder of such corporation may purchase."

Warren v. *Black Coal Co.*, 85 W. Va. 684, 690; 102 S. E. 672, 674.

Tierney v. *United Pocahotas Coal Co.*, 85 W. Va. 545, 559; 102 S. E. 249.

Wiley v. *Reaser*, 86 W. Va. 415, 423; 103 S. E. 362, 365.

Howard v. *Tatum*, 81 W. Va. 561, 567; 94 S. E. 965.

Under the law of West Virginia, there was nothing illegal, fraudulent or unfair about the dissolution and sale. It was carefully and extensively advertised. The price paid by the majority stockholder was better than the appraised value, admittedly fair. The sole contention of the plaintiffs is that the stock had another value not represented in the value of the physical assets.

The law of West Virginia is against the plaintiffs and the Circuit Court of Appeals' decision on this issue. Under the law of West Virginia, the majority stockholder buying the assets of a corporation must pay a fair price. A price to be fair is one that any willing buyer having no other interest would pay to a willing seller for such assets.

> *Tierney* v. *United Pocahontas Coal Co.*, 85 W. Va. 545, 559; 102 S. E. 249, 255.

Under the law of West Virginia, the full value of the Steamship Company as a going concern was no greater than the value that would be put upon it by a disinterested willing purchaser; and the majority stockholder making such a purchase would be in no different position and would be required to account for no higher value than any disinterested purchaser buying such a property from a willing seller.

Under the law of West Virginia, upon a purchase of the assets of the corporation by the majority stockholder the minority stockholder has no right to an interest in the property after the sale, or to an accounting for the profits that the majority may make out of that property. If the minority stockholder elects not to repudiate the transaction and demand a return of the property to his corporation, he can only recover for his share of the actual value of the property.

> *Tierney* v. *United Pocahontas Coal Co.*, 85 W. Va. 545; 102 S. E. 249; 89 W. Va. 402, 407; 109 S. E. 339, 341.

Under the law of West Virginia, the minority stockholder is not entitled to profits depending upon future conditions and contingencies.

> *Tierney* v. *United Pocahontas Coal Co.*, 85 W. Va. 545; 102 S. E. 249; 89 W. Va. 402, 407; 109 S. E. 339, 341.

Under the law of West Virginia, the right to carry the traffic of the Steel Company was not a property right of the Steamship Company to be included in its so-called going concern value. No willing buyer would have considered it or paid for it. The majority stockholder is not required to account for a property right which the corporation did not own. To hold a majority stockholder to account for a higher price would do more than to award compensatory damages and penalize him, contrary to equity principles.

Southern Pacific Ry. v. *Bogert*, 250 U. S. 483.

The Court of Appeals has decided this case contrary to the decision of this court in Southern Pacific *vs.* Bogart. The court there held that the minority stockholders had a right to receive in connection with a reorganization sale their "pro rata share of the common property" and "a fair participation in the fruits of the sale." The plaintiffs in this case have admittedly received their pro rata share of the physical properties and a fair participation in the fruits of the dissolution sale, but the Court of Appeals has held that in addition thereto the plaintiffs are entitled to receive a large award of damages arrived at by capitalizing past earnings, resulting from the carriage of the traffic of the Steel Company in the past, a right which was no part of the Steamship Company's "common property."

Southern Pacific Ry. v. *Bogert*, 250 U. S. 483.

Such an allowance would have been justified if an unexpired contract, requiring a continuance of the traffic arrangement between the two corporations, had been breached by means of a dissolution. But the parties to this case stipulated and agreed that "there was no contractual arrangement of any kind between Inland Steel Company and the Steamship Company with reference to the carrying by Steamship Company of all or any part of the tonnage of said Inland Steel Company." (O. R. 194.) This stipula-

tion is binding upon both the court and the parties. The Eighth Circuit Court of Appeals so held in *Nelson* v. *United States*, 131 F. (2d) 301, and in *Iowa Bridge Co.* v. *Commissioner*, 39 F. (2d) 777. The Fourth Circuit Court of Appeals so held in *Norfolk National Bank* v. *Commissioner*, 66 F. (2d) 48. The Court of Appeals for the Seventh Circuit has failed and refused to give effect to the agreed and stipulated fact that there was no contract between the Steel Company and the Steamship Company with reference to a continuance of the traffic arrangement which was responsible for the past profits of the Steamship Company. The parties further stipulated and agreed that without this traffic arrangement the Steamship Company would have suffered substantial yearly losses. (O. R. 196.)

Neither the Steel Company nor its officers were guilty of any fraud against the plaintiffs. The original promoters of the Steamship Company, the Steel Company through its Vice President, P. D. Block, and his brother-in-law, the father of these plaintiffs, knew the duties of the Steel Company towards its stockholders with reference to any proposed traffic arrangement between the two companies, and that any effort on their part to make that traffic arrangement perpetual, however much of a burden it might be on the Steel Company, would be a breach of their duty. There is no word in this record that they intended to make an arrangement which would be perpetual. If they had attempted to do any such thing by whatever scheme, any court upon proper showing would, we submit, have set such a scheme aside as a fraud on the Steel Company and its stockholders. These decisions sought to be reviewed engraft on the original idea of the promoters of this corporation just such an inequitable scheme. And the decree entered has accomplished in part at least what would have

been set aside as a fraud had the original promoters effected it.

Corsicana National Bank v. *Johnson*, 251 U. S. 68, 90.
Natural Gas v. *Slattery*, 302 U. S. 300.
Hope v. *Salt Co.*, 25 W. Va. 789.
Gilmore v. *Lewis*, 105 W. Va. 102, 141 S. E. 529.

The Question of Local Law Decided Is an Important Question.

The question thus decided by the Circuit Court of Appeals is vitally a part of the corporation law of West Virginia, as announced in its statutes and decisions. The question affects many vital and important rights of stockholders with reference to West Virginia corporations and as between themselves and, the liabilities and rights of subsidiaries and parent corporations.

These decisions, in fact, rest on a basic proposition that if the majority stockholder is a corporation doing business with the subsidiary corporation, it must continue to do so indefinitely or if it terminates the relationship, account on the theory that the business would have continued indefinitely. And so they engrat upon the corporation law of West Virginia a proposition which is in conflict with the general principles of corporation law of that state, as above pointed out, and is not supported by any authority in any other jurisdiction in the United States. No authority has been cited by the plaintiffs at any time to support it. We have been able to find none. Nor is there anything to be found in any of the treatises discussing the valuation of the rights of minority stockholders or subsidiary corporations, even suggesting that any such proposition would be sound from a legal, equitable or economical standpoint.

The reading into the West Virginia law governing its corporations of any such proposition as that upon which

this decision stands is of vital importance to the corporation law of West Virginia and to the many corporations existing by virtue of the law of that state, as well as also other states where similar statutes exist.

WHEREFORE, it is respectfully submitted that the writ of certiorari should issue to review the decree entered by the Circuit Court of Appeals for the Seventh Circuit on December 29, 1941, finding that the petitioner was liable to the respondents and remanding the cause for the determination of damages, and the decrees entered on July 29, 1943, *nunc pro tunc* as of July 16, 1943, directing the petitioner to pay to the plaintiffs, the Lebolds, $299,618.82.

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